

ENVIRONMENTAL

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EPA Issues Proposed Federal Regulations on Coal Ash



On June 21, 2010, the U.S. Environmental Protection Agency (“EPA”) released its proposed federal regulations (“Proposed Rule”) on the disposal and storage of coal ash. *See* Hazardous and Solid Waste Management System, 75 Fed. Reg. 35, 128-35, 264 (June 21, 2010). Currently, coal ash is considered an exempt waste under a 1980 amendment to the Resource Conservation and Recovery Act (“RCRA”). Public awareness of the potential environmental concerns from coal ash was raised as a result of the December 2008 failure of the coal ash surface impoundment at the Tennessee Valley Authority’s plant in Kingston, Tennessee, which flooded more than 300 acres of land and water with coal ash. In response, EPA is proposing to regulate coal ash under RCRA for the first time in order to address the risks posed by coal ash handling and disposal.

Under RCRA, the EPA has the authority to regulate solid and hazardous wastes. Subtitle C of RCRA governs the generation, transportation, treatment, storage, and disposal of hazardous waste. Subtitle D provides a framework for the management of non-hazardous solid wastes, leaving the majority of regulation to the individual states. In October 1980, RCRA was amended by adding section 3001(b)(3)(A)(ii), the “Bevill Exclusion,” to exclude “solid waste from the extraction, beneficiation, and processing of ores and minerals” from regulation as hazardous waste under Subtitle C of RCRA.

In the Proposed Rule, the EPA sets forth two options under RCRA for the regulation of the disposal and storage of coal ash from electric utilities. Under the first proposal, the EPA would list coal ash as special waste subject to regulation under Subtitle C, when such waste is disposed of in landfills or surface impoundments. Under the second proposal, the EPA would regulate coal ash under Subtitle D as a non-hazardous waste and would issue national minimum criteria for its handling and disposal. The Subtitle C option creates federal oversight of coal ash, while the Subtitle D option leaves enforcement to the states and citizen lawsuits. Under both proposals, the EPA is proposing to establish dam safety

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requirements to address the structural integrity of surface impoundments to prevent catastrophic releases, such as that which occurred at the Kingston plant.

Industry has raised concerns over the regulation of coal ash as it pertains to the continued ability to recycle coal ash waste. Currently, coal ash is used in concrete, cement, roadways, and other materials. The EPA has emphasized that it is not seeking to discourage the re-use of coal ash. Rather, the EPA claims that under the proposal that regulates coal ash waste under Subtitle C, coal ash would be classified as a "special waste" and that could still be used in "beneficial" ways.

The EPA has requested comments on the two proposals in order to determine its final approach for regulating the handling and disposal of coal ash. The 90 day public comment period on the Proposed Rule concludes on September 20, 2010. ■

If you have any questions or require our assistance in reviewing your policies or conducting management training, please contact the Hiscock & Barclay lawyer with whom you normally work or any attorney in our Environmental practice area.